Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Rulemaking to Amend Parts 1, 2, 21 and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services	)	CC Docket No. 92-297
	)	
Petitions for Reconsideration of the Denial of Applications for Waiver of the Commission's Common Carrier Point-to-Point Microwave Radio Service Rules	)	
	)	
Suite 12 Group Petition for Pioneer's Preference	)	PP-22

PETITION FOR RECONSIDERATION

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April 14, 1997

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SUMMARY

Petitioners request that the FCC reconsider the denial of reconsideration of the dismissal of their applications. Many of Petitioners' applications had previously attained "cut-off" status and were the subject of timely-filed competing applications or protests, some of which have been settled. It has long been recognized that cut-off applicants have certain equities in their favor due to that status, that should not be summarily or arbitrarily deprived. Moreover, where petitions to deny have been filed, the Act requires something more than the summary disposition accorded Petitioners' applications.

The FCC's summary dismissal of Petitioners' applications also failed to provide Petitioners with the "particular, individualized" review required in processing detailed applications and waiver requests.

Petitioners' applications are supported by many of the same justifications as the single LMDS waiver application that the FCC has granted. Indeed, Petitioners' proposals were even more spectrally-efficient than Hye Crest's granted proposal. The FCC has failed to provide any reasons for not affording Petitioners' applications the same favorable treatment as that other applicant. Moreover, the FCC has not indicated why pending applicants in other, similar services have been processed, while Petitioners and others in this proceeding were not given similar dispensation.

Finally, the FCC's findings with regard to the impact of Petitioners' proposals on assigned users of the 28 GHz band is contradicted by the rulemaking record and by the filings in response to Petitioners' individual applications; such unsupported findings must be reversed.

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To: The Commission

PETITION FOR RECONSIDERATION

LDH International, Inc. ("LDH"), Celltel Communications Corporation ("Celltel"), and CT Communications Corporation ("CT") (collectively, the "Petitioners"), by their attorneys and pursuant to Section 405 of the Communications Act of 1934, as amended (the "Act"), 47 U.S.C. § 405, and Sections 1.106(f) and 1.429(d) of the Commission's Rules, 47 C.F.R. §§ 1.106(f); 1.429(d)[1], hereby request reconsideration of the Second Report and Order, Order on

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[1] Section 1.429 of the Rules governs petitions for reconsideration of orders in notice and comment rule making proceedings; Section 1.106 governs petitions for reconsideration of other FCC actions. For documents in rule making proceedings, the thirty-day reconsideration period is calculated from the date that the order (or a summary thereof) is published in the Federal Register; for other documents, that period generally begins to run from the release date. See 47 C.F.R. § 1.4(b). The portion of the Second R&O for which Petitioners seek reconsideration is the denial of the petitions for reconsideration of the dismissal of their applications for 28 GHz facilities. Although the dismissal of applications would appear to be an adjudicatory action, that action was taken as part of a notice and comment rule making proceeding. Out of an abundance of caution, Petitioners are filing this Petition on the deadline calculated pursuant to Sections 1.106 and 1.4(b)(2). To the extent necessary, the Petitioners will supplement this filing within the period permitted by Sections 1.429 and 1.4(b)(1).

Reconsideration, and Fifth Notice of Proposed Rule Making in the above-captioned proceeding, FCC 97-82 (released March 13, 1997) (the "Second R&O"). In support hereof, the following is respectfully shown:

I. Background.

In early 1991, LDH filed 15 applications for facilities in the 28 GHz band, proposing a point-to-multipoint, non-common carrier, multichannel video service. In September of 1992, CT filed approximately 25 applications to provide a 28 GHz video service in additional markets. LDH's applications were accepted for filing by Public Notice of May 15, 1991; CT's applications have not yet been placed on Public Notice. LDH's applications were the subject of a Petition to Deny by Suite 12 Group ("Suite 12") on June 14, 1991; and, competing applications for 28 GHz video services were filed on LDH's "cut-off" date, July 15, 1991. On October 30, 1991, LDH, Suite 12, CellularVision, Inc. and Evanston Transmission Company sought the FCC's approval of a Settlement Agreement among the parties for certain of the contested markets; the FCC never acted on that proposed settlement.

On June 19, 1992, LDH submitted an amendment to its applications, on FCC Form 704, for the *pro forma* transfer of control of its applications to Celltel, a new corporation in which LDH held majority ownership and control. Celltel has also applied in its own name for 28 GHz facilities in New York, NY; that application was accepted for filing in September of 1992.

On January 8, 1993, the FCC released its Notice of Proposed Rule Making, Order, Tentative Decision and Order on Reconsideration in the above-captioned proceeding, 8 FCC Rcd. 557 (1993) (the "NPRM"). The NPRM proposed to redesignate the 28 GHz band from point-to-point use to point-to-multipoint use, permitting, *inter alia*, the provision of video

services. In addition to proposing rules for the proposed new "Local Multipoint Distribution Service" ("LMDS"), the NPRM dismissed the pending applications filed by Petitioners and others for LMDS-type 28 GHz systems.

Petitioners, along with numerous other parties whose applications had been dismissed, filed petitions for reconsideration of those dismissals on February 8, 1993. Concurrently, Petitioners and other affected applicants filed Petitions for Review of the NPRM with the U.S. Court of Appeals for the District of Columbia Circuit. See Case Nos. 93-1110, *et al.* That Court has ordered the consolidated appeals held in abeyance, pending FCC action in this proceeding.

The Second R&O allocated additional spectrum (from the 31 GHz band) to LMDS, and adopted auction rules for mutually exclusive LMDS applications. The Second R&O also denied the petitions for reconsideration filed by Petitioners and others. See Second R&O at ¶¶ 188-204. As applicants whose applications have been dismissed, Petitioners clearly have standing to seek reconsideration of that action. Consequently, and in order to ensure that the FCC has had an opportunity to consider all of the relevant issues in this proceeding, Petitioners are filing this Petition.[2]

II. Dismissal of Petitioners' Applications was Contrary to Law.

The applications of LDH and Celltel have attained cut-off status; LDH's applications have been subject to competing applications, a statutory protest, and finally, a settlement. The FCC erred in dismissing all of Petitioners' long-pending applications with no consideration

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[2] There are numerous issues raised in this Petition that the FCC has not previously considered (*e.g.*, the hearing rights of previously cut-off applicants) which it had a statutory obligation to consider. This Petition is filed to give the FCC a final opportunity to address those issues.

whatsoever.

A. Summary Dismissal of Cut-Off Applications Violates Petitioners' Rights under the Act, the Rules, and Precedent.

The FCC's cut-off rule for microwave services applicable at the time of Petitioners' applications, 47 C.F.R. §§ 21.31, was a validly adopted *rule*; and an agency is bound to follow its own rules. See Reuters, Ltd. v. FCC, 781 F.2d 946 (D.C.Cir. 1986) (*ad hoc* departures from the published cut-off rules, "even to achieve laudable ends" cannot be sanctioned). Under those Rules, many of Petitioners' applications can and should be granted or processed. While the FCC may adopt new rules, as it has done here, giving new rules retroactive effect is an extraordinary measure, and one that has often been frowned upon by the courts. See Yakima Valley Cablevision, Inc. v. FCC, 794 F.2d 737, 745 (D.C.Cir. 1986). In order to retroactively apply its new processing rules to divest previously cut-off applicants of the protection of that status, the FCC must balance the mischief of retroactive application with the harm of undermining the new rules that would occur otherwise. See, id. at 746; McElroy Electronics Corporation v. FCC, 990 F.2d 1351, 1365 (D.C.Cir. 1993) ("McElroy I"). The Second R&O does not even attempt to balance these issues.

Here, there would be little harm in processing at least those applications that attained cut-off status prior to the NPRM in this proceeding. Interested parties had ample opportunity at that time to protest those applications or to file competing applications; indeed, many parties exercised that opportunity. Additionally, all of those parties proposed services similar to those permitted under the Rules adopted in the current proceeding; consequently, processing of pending applications would not adversely affect the FCC's scheme for LMDS.

On the other hand, the harm of the retroactive application of the new rules is great. The

subject applications were pending for years, through no fault of the applicants. Petitioners expended substantial resources in designing their proposed 28 GHz video systems; that investment has been rendered worthless by the FCC's dismissal action.

Courts have consistently recognized the importance of adherence to the adopted cut-off rules, and the equities in favor of cut-off applicants. See, *e.g.*, McElroy Electronics Corporation v. FCC, 86 F.3d 248, 257 (D.C.Cir. 1996) ("McElroy II") (timely filers have "an equitable interest in the enforcement of the cut-off rules" and the FCC "may not decline to enforce its deadlines so long as the rules themselves are clear and the public notice apprises potential competitors"); Florida Institute of Technology v. FCC, 952 F.2d 549, 554 (D.C.Cir. 1992) (cut-off applicants "certainly have an equitable interest [in that status] whose weight it is 'manifestly within the Commission's discretion to consider'") (citations omitted). Abiding by the cut-off rules serves the public interest in the expeditious initiation of service, as well as the private interests of those applicants who undertake the effort and expense of diligently preparing and filing their applications. See e.g., Florida Institute of Technology, 952 F.2d at 554 (noting that "diligent applicants have a legitimate expectation that the cut-off rules will be enforced" and that the "essential basis of the cut-off rules is...the public's interest in having broadcast licenses issued (and service provided) without undue delay").

The auction authority contained in Section 309(j) of the Act does not undermine the importance of the cut-off rules; indeed, Section 309(j) instructs the FCC to heed the very policy concerns that have long supported the cut-off rules. Dismissal of pending, cut-off applications contravenes both the traditional policies behind cut-offs, and the express directives of Section 309(j).

Section 309(j)(3)(A) mandates that one of the factors the FCC must consider before instituting auctions is whether doing so will expedite service to the public. See 47 U.S.C. § 309(j)(3)(A). Cut-off rules serve that statutory goal of expediting service to the public by setting a date certain by which competing applicants must file. See Florida Institute of Technology at 554. If none are filed, and the first applicant is otherwise qualified, its application is ready for grant, dependent only on staff processing times. By dismissing cut-off applications, and leaving it to some point in the future to set new filing dates for auction "short forms," the Second R&O guarantees that it will be many months before service can be commenced in the affected service areas. That delay is contrary to the public interest and to the express mandate of Section 309(j)(3)(A) of the Act.

Moreover, Section 309(j)(6)(E) instructs the FCC to take measures to avoid mutual exclusivity, see 47 U.S.C. § 309(j)(6)(E); but, the Second R&O does precisely the opposite. Prospective competitors had ample opportunity under the "cut-off" rule in 47 C.F.R. § 21.31 to file mutually exclusive applications. In cases where they did file, those diligent competitors have equities which the courts have long acknowledged. See, e.g., McElroy II at 257. There is no statutory or judicial authority to re-open the "window" for those service areas to increase the number of competing parties. See, *e.g.*, McElroy II at 259 (FCC prohibited from "opening window" and allowing post-cut-off applicants to file on top of reinstated, cut-off applicants).

Consequently, the FCC should reinstate and process, to grant, all applications filed prior to the adoption of the NPRM in this proceeding, including the scheduling of any auctions to be held between those pending, mutually exclusive applications.

B. The FCC was Required to Process Petitions to Deny and Settlement Agreements.

As previously stated, LDH's applications were the subject of a Petition to Deny by Suite 12. Section 309(d)(2) of the Act provides that, where a petition to deny is filed, the FCC "shall" review the petition, and if the petition fails to raise a "substantial and material question of fact," the FCC "shall" grant the application and deny the petition, stating its reasons. See 47 U.S.C. § 309(d)(2).

Indeed, LDH's Oppositions to this pending Petition to Deny, alleged real party in interest and other substantive defects concerning those "MX" applications, such that those applications should be dismissed. Obviously, if the FCC reaches that conclusion upon review of the pleadings, LDH's applications will no longer be "MX'd" and should be granted. See e.g., McElroy I and II, ibid.

If the FCC finds that a petition does raise a "substantial and material question of fact" or is otherwise unable to make the required public interest findings, the Act requires that "the Commission shall formally designate the application for hearing[.]" See 47 U.S.C. § 309(e). The FCC has failed to follow the statutorily-mandated procedures in this case. See, *e.g.*, FCC v. Pottsville Broadcasting, 309 U.S. 134, 138 (1940) (FCC must honor the due process rights and private interests of applicants).

Moreover, the FCC's Rules provide for settlements of contested or conflicting applications, see 47 C.F.R. § 21.29; and such a settlement was submitted for the FCC's approval for certain of Petitioners' applications. The FCC has long held that such settlements serve the public interest by expediting service and conserving the FCC's resources. See, *e.g.*, La Star Cellular Telephone Co., 11 FCC Rcd. 1059, ¶ 13 (1996) (finding settlement agreement will serve

the public interest "by eliminating burdensome litigation"); Amendment of Section 73.3524 of the Commission's Rules Regarding Settlement Agreements Among Applicants for Construction Permits, 6 FCC Rcd. 2901, ¶8 (1991) ("expeditious resolution of proceedings to facilitate the offering of new service to the public is a primary concern"). Inexplicably, the FCC has failed to even consider the impact of the existence of Petitioners' settlement agreement, filed nearly one and one-half years before the mass dismissal of pending LMDS applications.

In short, the FCC has failed to follow the requirements of the Act with regard to Petitioners' protested applications, and has failed to follow its own Rules and precedents with regard to settlement agreements.

III. The FCC's Summary Dismissal Did Not Give Petitioners' Applications the Required "Hard Look".

Petitioners' applications requested waivers of certain provisions of the then-applicable Rules in Part 21, in order to provide a point-to-multipoint video service. Summary dismissal of those applications, in the course of a broader rule making, does not meet the level of review required in passing on requests for waiver.

"That an agency may discharge its responsibilities by promulgating rules of general application which, in the overall perspective, establish the 'public interest' for a broad range of situations, does not relieve it of an obligation to seek out the 'public interest' in particular, individualized cases." See WAIT Radio v. FCC, 418 F.2d 1153, 1157 (D.C.Cir. 1969). Waiver requests, such as those contained in Petitioners' applications, containing detailed specifications of the proposed service and its benefits, "are not to be subject to perfunctory treatment, but must be given a 'hard look.'" Id.

Rather than seeking the public interest in the "particular, individualized" applications

filed by Petitioners, the FCC dismissed those applications in a brief, three-paragraph "discussion," involving more than 900 other applications, in the middle of a rule making notice. See NPRM at ¶¶ 51-53. On reconsideration, the FCC allotted a mere seven pages of a 176-page rule making document to its consideration of all the pending petitions for reconsideration. Petitioners' applications have yet to receive the consideration that judicial precedent - and fundamental fairness - require.

V. The FCC has Failed to Justify Its Disparate Treatment of LMDS Applicants.

A. Disparate Treatment Among LMDS Applicants.

In January of 1991, the FCC granted a waiver of various provisions of Part 21 of the Rules to Hye Crest Management, Inc. ("Hye Crest") to construct an LMDS system in the 28 GHz band in the New York City area. See Hye Crest Management, Inc., 6 FCC Rcd. 332 (1991). In granting Hye Crest's waiver, the FCC found that the 28 GHz band was suitable for a proposed multichannel video service; that the 28 GHz band was under-utilized; that the "foreseeable demand" for point-to-point use of the band was "practically non-existent[;]" and that the public interest would be served by increasing diversity and competition in the distribution of video programming. See 6 FCC Rcd. at ¶¶ 21-24.

These same justifications underlay Petitioners' applications; yet, in contrast to the favorable treatment accorded Hye Crest, Petitioners were subjected to summary dismissal of their applications. Similar to Hye Crest, Petitioners proposed novel video and data distribution on the 28 GHz band in defined urban areas. See File Nos. 10791-CF-P-91, *et al.* Petitioners likewise demonstrated that there were no other licensees or applicants for the subject frequencies in or around Petitioners' proposed service areas. Compare id. with Hye Crest Application, File

No. 10380-CF-P-88. Moreover, Petitioners proposed spectrally-efficient technologies that would have required less spectrum than the Hye Crest proposal. Id.; see also LDH Opposition to Petition to Deny (filed July 10, 1991).

The FCC's summary dismissal did not even attempt to distinguish Petitioners' proposals from the granted Hye Crest proposal. The FCC has an obligation to "treat similar supplicants similarly." See NBC v. FCC, 362 F.2d 946, 953; see also, FTC v. Crowther, 430 F.2d 510, 514 (D.C.Cir. 1970). When its treatment of similar parties is dissimilar, the FCC is required to explain the disparate treatment in light of the statutory purposes of the Communications Act. See Garrett v. FCC, 513 F.2d 1056, 1060 (D.C.Cir. 1975), citing Melody Music, Inc. v. FCC, 345 F.2d 730, 732-33 (D.C.Cir. 1965). In this case, it has utterly failed to do so. Consequently, Petitioners' applications should be reinstated.

B. Disparate Treatment of LMDS Applicants and Applicants in Other Services.

In the context of MDS/MMDS - a service the FCC has found similar to LMDS - the FCC recognized the equities in favor of applicants whose applications had been pending for years. See Report and Order in MM Docket No. 94-131 and PP Docket No. 93-253, FCC 95-230, ¶ 89 (released June 30, 1995). In its proceeding to adopt wide-area licensing and auction rules for "wireless cable," the FCC determined that those applications should be processed, pursuant to the pre-auction authority rules under which the applicants had applied. Id.

Here, the FCC has provided no accommodation whatsoever for applicants who filed well before the NPRM in this proceeding. The FCC has provided no basis for differentiating the LMDS applicants from those in other services whose rights have been accommodated. The FCC's failure to accord similar treatment to similarly-situated parties warrants reconsideration.

VI. The FCC's Factual Determinations are Not Supported by the Record.

In denying reconsideration of the dismissed applications, the FCC claims that a grant of the pending applications would have prejudiced assigned users of the 28 GHz band. See Second R&O at ¶¶ 391-396. The FCC indicated that the class being protected were potential point-to point applicants. Id. at ¶ 392. Those findings directly contradict the FCC's findings elsewhere.

The FCC found, both in this proceeding and in granting Hye Crest's waiver, that the band was extremely under-utilized and that demand by point-to-point users was "practically non-existent." See, *e.g.*, Hye Crest Management, Inc., 6 FCC Rcd. 332 at ¶ 23; NPRM, 8 FCC Rcd. 557 at ¶¶ 5, 12. Indeed, Petitioners' applications confirmed that there were no existing or proposed point-to-point users of the 28 GHz band in their proposed service areas. See File Nos. 10791-CF-P-91, *et al.* Moreover, LDH's and Celltel's applications were placed on Public Notice, and interested parties had sixty days within which to file competing applications if they so desired. See 47 C.F.R. § 21.31. The only competing applications filed were to provide LMDS-type services; not a single mutually exclusive applicant filed for a traditional point-to-point system. In short, the FCC's finding that prospective point-to-point applicants for the 28 GHz band would be prejudiced by Petitioners' applications was clearly erroneous, and should be reversed. See, *e.g.*, Cincinnati Bell Telephone Co. v. FCC, 69 F.3d 752, 762-763 (6th Cir. 1995) (PCS cellular eligibility rules overturned because "the FCC provided little or no support for its assertions; in order sustain FCC, "support for the agency's action must exist in rulemaking record").

Conclusion

For all the foregoing reasons, Petitioners respectfully request that the FCC reconsider its Second R&O to the extent requested herein, reinstate Petitioner's applications, and complete processing of those applications.

Respectfully submitted,

LDH INTERNATIONAL, INC.
CELLTEL COMMUNICATIONS CORPORATION
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April 14, 1997

CERTIFICATE OF SERVICE

I, Regina Wingfield, a legal secretary in the law firm of Joyce & Jacobs, Attys. at Law, LLP, do hereby certify that on this 14th day of April, 1997, copies of the foregoing Petition of Reconsideration were mailed, postage prepaid, to the following:

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